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December 30, 1997

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CC 98-1
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JAN - 5 1998

Magalie Salas
Secretary
Federal Communications Commission
1919 Mary Street, N.W., Room 222
Washington, D.C. 20554

DOCKET FILE COPY ORIGINAL

FCC MAIL ROOM

Re: Petition of the State of Minnesota, Acting by and Through the Minnesota Department of Transportation and the Minnesota Department of Administration, for a Declaratory Ruling Regarding the Effect of Sections 253(a), (b) and (c) of the Telecommunications Act of 1996 on an Agreement to Install Fiber Optic Wholesale Transport Capacity in State Freeway Rights-of-Way
CC Docket No. 97-

Dear Ms. Salas:

Enclosed for filing please find the original and four copies of the above-referenced petition. A copy of the petition is being sent to counsel for the Minnesota Telephone Association.

Sincerely,

SCOTT WILENSKY
Assistant Attorney General
(612) 297-4609

Enclosures

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION

RECEIVED

JAN - 5 1998

FCC MAIL ROOM

In the Matter of)
)
The Petition of the State of Minnesota,)
Acting by and Through the Minnesota)
Department of Transportation and the)
Minnesota Department of)
Administration, for a Declaratory Ruling)
Regarding the Effect of Sections 253(a),)
(b) and (c) of the Telecommunications)
Act of 1996 on an Agreement to Install)
Fiber Optic Wholesale Transport)
Capacity in State Freeway Rights-of-Way)
)

CC Docket No. 97-98-1

**PETITION FOR DECLARATORY RULING
REGARDING THE EFFECT OF SECTIONS 253(a), (b) AND (c)
OF THE TELECOMMUNICATIONS ACT OF 1996
ON AN AGREEMENT TO INSTALL
FIBER OPTIC WHOLESALE TRANSPORT CAPACITY
IN STATE FREEWAY RIGHTS-OF-WAY**

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Pursuant to Section 1.2 of the Commission's Rules (47 C.F.R. § 1.2), the State of Minnesota (the "State"), acting by and through the Minnesota Department of Transportation ("MnDOT") and the Minnesota Department of Administration ("DOA"), respectfully petitions the Federal Communications Commission ("FCC") for a ruling declaring that the State's proposal to grant, to a wholesale carrier of fiber optic transport capacity, exclusive access to State freeway rights-of-way, subject to the wholesaler's obligation to make such capacity available to all telecommunications service providers on a competitively neutral and non-discriminatory basis, is consistent with 47 U.S.C. §§ 253(a), (b) and (c) of the Telecommunications Act of 1996 ("Telecom Act").

MnDOT exercises statewide authority over the construction and operation of state trunk highways, including freeways, in the State of Minnesota. DOA exercises statewide authority over state government administration, and in that capacity oversees an integrated system of telecommunications for a variety of state and local agencies.

I. SUMMARY OF MINNESOTA'S POSITION.

A. The Agreement.

The State has entered into an agreement (the "Agreement") with a team composed of ICS/UCN LLC, a Colorado limited liability company, (the "Developer") and Stone & Webster Engineering Corporation, a Massachusetts corporation. The Developer will be a provider of wholesale fiber optic transport capacity, both "lit" and "unlit." The Agreement gives the Developer exclusive access, for a specified time period, to certain State freeway rights-of-way for longitudinal (i.e. along, or parallel with, the rights-of-way) for installation of fiber optic cable, in exchange for the Developer's provision of a share of lit and dark capacity of the Developer's network, which the State will use to meet its telecommunications needs in both rural and urban areas. The State use will include operation of Intelligent Transportation Systems (ITS).

As demonstrated below, the Agreement will not prohibit or have the effect of prohibiting any entity from providing telecommunications services. Further, the Agreement will protect the safety and convenience of the traveling public and transportation workers, minimize economic losses due to congestion resulting from utility operation and maintenance, and assure that compensation for access to such rights-of-way is competitively neutral and non-discriminatory.

B. Background.

Historically, the need to maximize the safety of the traveling public and transportation workers, and to minimize the enormous economic losses from traffic congestion caused by utility operation and maintenance in the rights-of-way, has led MnDOT to prohibit or strictly limit the longitudinal installation of utility facilities in freeway rights-of-way. This practice was required of states by the FHWA until 1989. Since then the MnDOT continued the policy of not allowing placement of utilities in the freeway rights-of-way.

In 1996, Congress enacted the Telecom Act, which is designed, among other things, to remove prohibitions against competition in all areas of telecommunications service. Section 253(a)¹ of the Telecom Act provides that “[n]o State or local statute or regulation or other . . . requirement may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service.” Section 253 also includes provisions that preserve the pre-existing rights of states to protect public safety and to manage their rights-of-way. Telecom Act, § 253(b) and (c). Where Section 253(c) is applicable and a state or local government decides to charge for access to its rights-of-way, it must do so on a competitively neutral and non-discriminatory basis. Telecom Act, § 253(c).

Also in 1996, MnDOT and DOA resolved to improve the State’s telecommunications capabilities, to reduce the State’s telecommunications costs (including the cost of developing intelligent transportation systems, or “ITS”), to provide additional fiber optic telecommunications capacity to rural areas, and to increase competition for telecommunications

¹ Unless otherwise noted, all section references are to Title 47 of the United States Code.

services through the creation of additional wholesale transport capacity. Working together, MnDOT and DOA determined that they could accomplish those goals, consistent with MnDOT's responsibility to protect the safety and convenience of the traveling public, by granting to a single developer exclusive access to the State's freeway rights-of-way to construct and maintain wholesale fiber optic transport capacity, subject to the dual obligations to (1) concurrently install and maintain fiber optic cable on behalf of any carriers on a competitively neutral and nondiscriminatory basis, and (2) to make the capacity of its own system available to all telecommunications service providers on a competitively neutral and non-discriminatory basis. Following established competitive procurement processes, the State then issued a request for proposals, evaluated responses based on stated criteria and selected the team of Developer and Stone & Webster for purposes of negotiation.

C. Opposition By The Minnesota Telephone Association.

The Minnesota Telephone Association ("MTA"), a private association of approximately 88 of the State's 92 incumbent local exchange companies, has protested the State's plan to permit only a single developer to install, operate and maintain the fiber network in State freeway rights-of-way. The MTA's member companies, of course, already have fiber in place and are most threatened by the introduction of an additional statewide fiber backbone network that will increase competition. In response to the award to Developer of the right to negotiate, and without knowledge of the State's proposed contractual terms and conditions, the MTA asserted in a letter to MnDOT that a single developer's exclusive access to freeway rights-of-way for longitudinal fiber optic cable installation violates Section 253(a) of the Act. See Exhibit 1. The MTA recently reasserted its protest to the State's plan and the State has responded. See Exhibits 2, 3, and 4.

For the reasons outlined below, the State disagrees with the MTA:

1. Telecom Act not applicable to telecommunications infrastructure.

The Agreement involves the creation of infrastructure and not the provision of telecommunications service. Developer is a wholesaler of fiber optic transport capacity and will not offer or provide telecommunications service to the general public. Developer is a “carrier’s carrier,” and is performing a function for which the FCC has deemed regulation unnecessary in the absence of market power, both before and after the enactment of the Telecom Act. Section 253(a) on its face limits State and local efforts to prohibit provision of telecommunications *services*, defined as telecommunications provided to the public, and says nothing whatever about telecommunications infrastructure. Thus, Section 253(a) of the Telecom Act does not apply to the Agreement.

2. The State restriction does not prohibit or have the effect of prohibiting an entity from providing telecommunications service.

Even if Section 253(a) applies to the infrastructure investment, the availability of fiber optic capacity and alternative rights-of-way in the State is so great that the Agreement could not have the effect of prohibiting the ability “of any entity to provide any interstate or intrastate telecommunications service.” Alternative providers currently offer competitive choices to the use of Developer’s wholesale fiber transport capacity and alternative rights-of-way are available to new entrants in the fiber transport market. No new restrictions are being imposed upon this already competitive market that did not exist prior to the evolution of robust competition for fiber transport capacity. Contract conditions requiring Developer to collocate fiber of other entities in the rights-of-way and to sell or lease facilities, on a non-discriminatory basis, serve to make the contract functionally non-exclusive. See Exhibit 5.² The practical impact of the Agreement is that the competitive environment will be enhanced.

² Exhibit 5 contains the contract provisions relevant to this proceeding, along with a table of contents. The State will be happy to provide the entire contract if that will be more useful to the Commission.

3. The State has the right to protect public safety and manage its rights-of-way.

Even should the Commission find that the Agreement implicates Section 253(a), Sections 253(b) and (c) of the Act preserve the right of States to protect the public safety, and of state and local governments to manage their rights-of-way. The grant of exclusive longitudinal access to the freeway rights-of-way represents a legitimate exercise of the rights acknowledged by Sections 253(b) and (c) to maximize the safety of the traveling public and transportation workers and to manage these unique rights-of-way.

D. Request For Expedited Review.

Because of the significant dispute between the State and the MTA, the State seeks a ruling from the Federal Communications Commission ("the Commission") declaring that the Agreement is consistent with Section 253(a), (b) and (c) of the Telecom Act. An expedited ruling is essential to the long-term financing and implementation of the project, and the achievement of the project's significant public benefits. Because of the importance of this issue to the project, the Developer is unlikely to attract the investment necessary prior to Commission review. Investors, the State and Developer need greater assurance before plans to lay nearly 2,000 sheath miles of fiber can be fully implemented.

Moreover, the issue presented by this petition is critical to all large holders of freeway rights-of-way throughout the nation, including state departments of transportation, regional transportation authorities, turnpike authorities, and other transit agencies. For instance, Departments of Transportation in Illinois, Oregon, Utah, Colorado and Michigan are currently seeking to move to fruition privately sponsored projects for installing telecommunications networks in freeways. The need for such agencies to pursue telecommunications projects in freeway rights-of-way is presented by the rapid changes and increased use of fiber in transportation systems. The agencies also need assurance that such plans would not jeopardize their ability to manage rights-of-way consistent with the public interest. The Commission is

requested to act on this petition on an expedited basis, and to adopt the ruling which the petitioner urges.

II. STATEMENT OF FACTS.

A. Historical State Regulation And Management Of Utility Installations In Freeway Rights-of-Way.

Until 1990, MnDOT prohibited longitudinal access along freeways for installations of utility facilities, consistent with pre-1989 Federal Highway Administration ("FHWA") policies and regulations applicable to federal aid highways (Minnesota Rules, Parts 8810.3300), and the pre-1989 policies of the American Association of State Highway Transportation Officials ("AASHTO").

This State practice is consistent with the practices and policies of both the FHWA and AASHTO. FHWA states, in a technical report, as follows:

Traditionally, access for non-transportation communication networks in highway rights-of-way has been carefully controlled, particularly with respect to freeways and limited access highways. The intent has been to minimize the negative impact of utility maintenance vehicles on traffic flow and traffic safety, minimize obstructions in the rights-of-way and avoid open cuts into roads and rights-of-way that utility lines typically require, and minimize the costs and complexities of future roadway expansion or modification."³

In 1989, FHWA revised its regulations prohibiting longitudinal access along federal aid highways and delegated to the states the responsibility for adopting policies and regulations governing utility installations.⁴ In 1990, MnDOT adopted its *Procedures for Accommodation of*

³ FHWA Final Report (1996), "Shared Resources: Sharing Right-of-Way for Telecommunications," p.4. (Co-authored by Nossaman, Guthner, Knox & Elliott, LLP, consultants for Petitioners, and Apogee Research, Inc.)

⁴ The FHWA's Highway/Utility Guide, published in June 1993, provides a history of utility accommodation in highway rights-of-way and reveals that, prior to 1989, FHWA guidelines (and those of AASHTO) either prohibited or strictly limited longitudinal use of rights-of-way for installation of utility facilities. (U.S. Department of Transportation Federal Highway Administration, Highway/Utility Guide, Pub. No. FHWA-SA-93-049, June 1993, at 10-15.)

*Utilities on Highway Rights-of-Way.*⁵ These Procedures continue MnDOT's policy of granting access permits for perpendicular utility crossings of all types of trunk highways⁶ and for longitudinal installations in trunk highways other than freeways, and provide for the grant of permits for longitudinal placement of fiber optic cable along freeway⁸, subject to particular terms and conditions not generally applicable to perpendicular utility crossings or longitudinal utility installations along other State trunk highways.⁷

AASHTO policy⁸ provides that "[n]ew utilities [including communications facilities] will not be permitted to be installed longitudinally within ... any freeway, except that in special cases such installations may be permitted under strictly controlled conditions,"⁹ and requires a utility to show that "the [utility] accommodation will not adversely affect highway and traffic safety"; that "alternate locations are not available or cannot be implemented at reasonable cost . . . ; that the accommodation will not adversely affect the design, construction, operation, maintenance, or

⁵ See, MnDOT Procedures for Accommodation of Utilities on Highway Right of Way, Highway No. 90-1-P-1, dated July 27, 1990, Section II.

⁶ The term "State Trunk Highway" is defined as any highway designated a State Trunk Highway pursuant to Minnesota Statutes Ch. 161. State Trunk Highways include "freeways," which are defined as any divided highway for through traffic with full control of access. The Agreement provides for installation of a fiber optic network, in significant part along freeway rights-of-way. Thus, this petition uses the terms "freeway" and "freeway right-of-way."

⁷ To date, MnDOT has granted only one permit for longitudinal utility access along freeways that is not incidental to perpendicular crossings. That single permit was granted pursuant to a special statute the State legislature enacted on April 20, 1990 (see, Ch. 426, H.F. No. 1857, sec. 7). This special statute (and the fiber installed pursuant to its terms) covered limited portions of I-94 and I-494 in Hennepin County, Minnesota.

⁸ See, A Policy on the Accommodation of Utilities Within Freeway Right-of-Way, American Association of State Highway and Transportation Officials, February, 1989 (hereinafter, "AASHTO Policy").

⁹ Id., at 3.

stability of the freeway; and that it will not interfere with or impair the present use or future expansion of the freeway.”¹⁰

These Federal and State policies are essential to protecting the safety of the traveling public and transportation workers, and to minimizing the economic losses resulting from traffic congestion.

The State also has a significant fiscal interest in minimizing the number of utility installations in freeway rights-of-way. The presence of utility facilities in rights-of-way necessarily compromises MnDOT’s ability to efficiently build, maintain, expand and relocate freeways. Each additional utility installation by a different utility increases MnDOT’s burden, because maintenance of separate facilities increases the costs associated with freeway construction, maintenance, administration, expansion and relocation.

Based upon these concerns regarding the safety of the traveling public and transportation workers and the potential adverse consequences with respect to congestion and resultant economic loss, MnDOT’s transportation engineers concluded that a permit process similar to that used for its State Trunk Highway system was not feasible. Instead, they determined that optimum management of its freeways requires a single point of control and contact to install and maintain fiber, requiring exclusive longitudinal access to such rights-of-way for creation of this fiber optic transport capacity. The alternative to single-party exclusive access is no access at all; multi-party longitudinal access will unduly compromise public safety and convenience, and MnDOT’s efficient development, maintenance and relocation of freeways. Affidavit of Lari.

¹⁰ Id., at 3-4. AASHTO also requires any longitudinal freeway accommodations be subject to the issuance of a permit by the appropriate state highway agency, which, in Minnesota, is MnDOT.

AASHTO’s 1996 Guidance on Sharing Freeway and Highway Rights-of-Way for Telecommunications (AASHTO Task Force on Fiber Optics on Transportation Rights-of-Way) acknowledges the difference between fiber optics and other utilities, and sanctions the longitudinal installation of fiber optics in freeway rights-of-way, but also reaffirms all the transportation management values traditionally affirmed by AASHTO, as described above.

B. The Agreement For Longitudinal Installation Of A Fiber Optic Cable Network In State Freeway Rights-Of-Way.

1. Procurement.

In February 1996, MnDOT issued a request for proposals for the development of telecommunications transmission capacity in State freeway rights-of-way, in exchange for the proposer's exclusive access to such rights-of-way.

The State (acting through MnDOT and DOA) seeks to further four public policy goals:

(a) utilize the transmission capacity obtained through the Agreement for the development of various ITS applications, which will increase the efficient use of State freeways by the traveling public and to meet many of the other general telecommunications needs of MnDOT and other State agencies.

(b) create an opportunity to extend a fiber optic network to rural areas of the State, which otherwise would have little or no prospect of being served by alternative sources of fiber;

(c) reduce telecommunications costs to State government by exchanging rights-of-way access for transmission capacity; and

(d) increase competition by adding another fiber optic telecommunications network within the State.

MnDOT received and evaluated several proposals according to its customary procurement procedures. These procedures assured fair evaluation based on stated review criteria, standards and procedures, and resulted in the selection of the Developer, based on MnDOT's determination that the Developer's proposal was most advantageous to the State.

2. Exclusivity provisions of the Agreement.

To meet the State's critical public safety and rights-of-way management concerns, the Agreement grants the Developer an exclusive right of longitudinal access to freeway rights-of-way to install and maintain fiber optic cable and related equipment. Exhibit 5, Sections 3, 7 and 11 (describing the rights granted to Developer regarding use of the freeway rights-of-way and the

State's use of Developer's fiber network). However, the exclusivity only restricts physical access to the freeway rights-of-way. Telecommunications carriers will have access to the new fiber optic transmission capacity created in accordance with the terms of the Agreement.

The Agreement imposes dual duties on the Developer to, on a competitively neutral and non-discriminatory basis: (1) install and maintain fiber capacity owned by third parties; and (2) make available through purchase and/or lease wholesale fiber transport capacity for both dark and lit fiber. Exclusive longitudinal access for fiber **installation and maintenance** is not to be confused with **use of** Developer's transport capacity. The first duty requires Developer to install, concurrently and parallel with installation of its own fiber cable, fiber cable to be owned and used by other wholesale and/or retail telecommunications carriers. This third party fiber is referred to as "non-network capacity" or "collocated fiber". Installation of non-network capacity must occur at the same time as installation of network capacity, and be performed by one contractor, to avoid unnecessary intrusion on freeway rights-of way and the attendant safety risks and public costs of working with multiple contractors and/or successive installations. Exhibit 5, Sections 5.12 and 7.7. Collocated fiber is distinct from the capacity installed by Developer for the Project as described in Part C *infra*. This fiber capacity is referred to as "Developer's network capacity."

The Agreement requires the Developer to make both collocation opportunities and opportunities to purchase or lease the Developer's network capacity available to all similarly situated customers at non-discriminatory rates and charges consistent with Section 253(c) of the Telecom Act. As a result, the State will limit physical access to freeway rights-of way for construction and maintenance to a single point of control and contact. However, installation and maintenance of collocated fiber and use of Developer's network capacity will be available to multiple telecommunications carriers on non-discriminatory terms. Exhibit 5, Section 7.7. Thus, the Agreement operates so as to be **functionally non-exclusive**.

The exclusive right of access will have a duration of ten years from completion of the Project, after which Developer has a right of first negotiation for an additional ten years, in the event that the State seeks to reopen freeway rights-of way. Exhibit 5, Section 11.1.

3. Operations, maintenance and administration provisions of the Agreement.

The Developer will provide wholesale transport capacity. It will operate the network as a carrier's carrier and will not offer telecommunications services directly or indirectly to the public.¹¹ Exhibit 5, Section 3.1(b)(vii). In addition, Developer will install (at the same time as it installs its network), maintain and operate fiber owned by third parties (i.e., the collocated fiber).

Consistent with MnDOT's resolve to protect the safety and convenience of the traveling public, the Agreement requires the Developer to adhere to a strict plan for administration, operation and maintenance of fiber capacity. The plan will limit the times, locations and methods of access to freeway rights-of-way for maintenance and operational activities. It also will limit the number of maintenance and operations contractors under the control of Developer who will have access. No user of network capacity and no other carrier which owns collocated fiber will have any ordinary right to access freeway rights-of-way for maintenance operations. Exhibit 5, Sections 7.3 and 7.4.

4. Publication of rates, charges and compensation.

The Agreement complies with publication requirements of Section 253(c). MnDOT will publish: (a) the Developer's customer classifications, rates and charges; and (b) the consideration the State receives under the Agreement. Exhibit 5, Section 7.7.

¹¹ Developer's affiliates may offer retail telecommunications services to the public and may utilize network transport capacity for this purpose. To this extent they will be treated the same as an unrelated user of the network; and the Developer will be bound to substantiate in written contracts that it charges related users and similarly situated unrelated users uniform and nondiscriminatory rates. Exhibit 5, Section 7.8.

C. Description Of The Proposed Project.

The Developer plans to install fiber optic rings in three regions of Minnesota. The southern ring will reach the cities of Rochester, Windom, and Owatonna. The northern ring will reach Thief River Falls, Detroit Lakes, Crookston, Moorhead, Duluth and Hibbing. Fiber will also be installed in the Minneapolis/St. Paul metropolitan area. See Exhibit 7 for a map of the proposed project. This is the capacity referred to herein as "Developer's network capacity."¹²

The Developer will install approximately 1,900 sheath miles of fiber and 76,000 kilometers of fiber strand. Of this, approximately 1,000 sheath miles will be placed on freeway rights-of-way and another 900 sheath miles will be installed on State Trunk Highway rights-of-way. Access to the freeway rights-of-way involved in the project will be provided to Developer on an exclusive basis. Access to State Trunk Highway rights-of-way involved in the Project are, and will continue to be, open to all potential telecommunications providers, including Developer, on a permit basis.

The Developer must also install and maintain collocated fiber for third parties running parallel to Developer's network on a non-discriminatory basis.

The project will meet the State's objectives in deploying ITS by constructing fiber on the freeway for the State's Traffic Management Center (TMC). The fiber will allow for digital communications to the TMC which can post different signs and messages based on traffic volumes and weather conditions. The project will also connect 17 MnDOT offices with interoffice data and video transport while connecting 12 locations for MNET, the DOA's state telephone and broad band communications system. Exhibit 6, Affidavit of Lari.

¹² Pursuant to the Agreement, Developer must construct the routes described in this section. Developer also may construct additional routes to further deployment of the State's ITS capability. Such routes are referred to as optional Phase 1 routes, or optional routes. Exhibit 5, Section 5.11.

D. Availability of Alternate Telecommunications Transmission Facilities and Rights-of-Way.

There are currently at least seven interexchange fiber optic networks in Minnesota owned and operated by various telecommunications service providers, including U S West, AT&T, Sprint, Wiltel, U.S. Link, MCI and Minnesota Equal Access Network Systems (MEANS), which is owned by over 60 of the State's small incumbent local exchange companies.¹³ There is significant fiber capacity currently installed in the State and current capacity can be expanded by upgrading electronics on various networks. The Agreement adds yet additional capacity within the State. Exhibit 8, Affidavit of Bhimani.

All State Trunk Highway rights-of-way, including those which will be utilized for nearly half the project, are available to competitors to install telecommunications networks. Other rights-of-way include those along railroads, oil pipelines, natural gas pipelines, high-voltage transmission lines and municipal rights-of-way. Exhibit 6, Affidavit of Lari. Maps showing the routes of these alternative rights-of-way are included as exhibits.

III. ARGUMENT.

A. Section 253(a) Of The Telecommunications Act Is Aimed At Services To The Public, Not Infrastructure.

Section 253(a) provides:

No State or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting *the ability* of any entity *to provide any* interstate or intrastate *telecommunications service*. (Emphasis added.)

Section 153 (51) defines the term "telecommunications service" to mean "*the offering of telecommunications for a fee directly to the public*, or to such class of users as to be effectively available directly to the public" (Emphasis added.) *In the Matter of New England Public*

¹³ U S West's network is currently limited to carrying traffic within LATAs, however, if it opens its local exchanges to competition it can seek approval pursuant to 47 U.S.C. § 271 to carry in-region interLATA traffic.

Communications Council Petition for Preemption, pursuant to Section 253, Memorandum, Opinion and Order, FCC 96-470, File No. CCB Pol 96-10, (rel. December 10, 1996) (“New England”), the Commission first inquired into whether a restriction on the provision of private payphones constituted a prohibition on the provision of “telecommunications service.” The Commission held that the retail use of payphones caused payphone service to fall within the definition because telecommunications service was provided directly to the public. *Id.*

Here, the Developer is not a provider of telecommunications services. It will not provide any services directly to the public nor receive any fee directly from the public. Exhibit 5, Section 3.7(b)(vii). Developer is contractually restrained to constructing fiber transport capacity for sale or lease on a wholesale basis. Prior to and subsequent to passage of the Telecom Act, the Commission has refrained from considering wholesale transport capacity where the provider lacked market power to fall within the definition of telecommunications service. Wholesale transport capacity is not a telecommunications service typically regulated by the Commission. *See In the Matter of Atlantic Express Communications, L.L.C. Application for a License to Land and Operate a Submarine Fiber Optic Cable Between the Northeastern United States and the United Kingdom*, File No. SCL 95-005, Order Dated June 10, 1996, 11 FCC Rcd. 7033 (1996); *In the Matter of Norlight Request for Declaratory Ruling*, File No. PRB-LMM086-07, Order Dated January 13, 1987, FCC Rcd. 132 (1987).

The legislative history of the Telecom Act focuses on state and local government actions that impede provision of telecommunications *services*, and not on telecommunications infrastructure. House Conference Report No. 104-458 on the 1996 Act, dated January 31, 1996, states that Section 253 “is intended to remove all barriers to entry in the provision of telecommunications services.” (U.S. Code Congressional & Administrative News, March 1996, vol. 1, Legislative History section, at 138; emphasis added.) There is no mention, in the House Conference Report for Section 253, of any matter which relates to telecommunications infrastructure. As stated by Congressman Tim Holden (D-Pa.), in urging the House of Representatives to pass the 1996 Telecom Act:

[Section 253(a)] furthers the vital local telecommunications competition goal by prohibiting states and local governments from erecting barriers to new entrants providing *service*. This is an excellent provision, but, because it is a general mandate, there may be creative attempts to get around it ... It is for that reason that I would like to spell out in more detail the types of requirements that state and local governments should not be able to impose:

A state or local government should not be able to require that any provider:

Demonstrate that its *provision of service* would not harm the competitive position of any current or future providers of service, would be beneficial to consumers, or would not affect universal service;

Show that its *provision of service* would not harm the network of any provider ...

Agree *to provide service* in, or build out, all or any parts of a franchise territory;

Show financial capabilities not relevant to *the service to be provided* and not required of other providers;

Limit its *offering of service* until another provider obtains regulatory relief, that is, withhold *offering a service* until the incumbent provider receives pricing flexibility ... (Emphasis added.)^{14 15}

¹⁴ See, statement of Representative Tim Holden (D-Pa.), dated February 1, 1996, urging the adoption by the U.S. House of Representatives of the 1996 Act.

¹⁵ The larger context of the 1996 Act confirms the focus of the Act on the opening of competition for telecommunications *services*, as opposed to a focus on infrastructure concerns. The main elements of the 1996 Act all relate to the ability of various entities to provide various types of telecommunications *services*. For example, Sections 251 and 252 require all telecommunications carriers to interconnect with the facilities of other telecommunications carriers for purposes of permitting any entity to provide *local exchange services*. Section 257(a) requires the FCC to initiate and complete within 15 months of the enactment of the 1996 Act "a proceeding for the purpose of identifying and eliminating ... market entry barriers ... in the provision and ownership of *telecommunications services* ..." (emphasis added). Sections 271-276 provide various

Where Congress intended by the Telecom Act to regulate use of telecommunications infrastructure, it said so. For example, Section 259, entitled "Infrastructure Sharing", requires the FCC to adopt "regulations that require incumbent local exchange carriers . . . to make available to any . . . carrier such public switched network infrastructure, technology, information, and telecommunications facilities and functions as may be requested by such . . . carrier *to provide telecommunications services, or to provide access to information services . . .*" (Emphasis added.)¹⁶

The historical context of the enactment of the Telecom Act also sheds light on the "services" focus of Section 253(a). Congress enacted the Telecom Act in response to a specific historical state of affairs that resulted from the breakup of the Bell System in 1984, pursuant to the Modified Final Judgment ("MFJ") in *United States v. American Telephone & Telegraph*, 559 F.Supp. 131 (D.D.C. 1982). The MFJ effectively created a long distance services market -- in which the BOCs and other local exchange carriers ("LECs") could not participate -- and a local exchange services market -- in which long distance carriers such as AT&T, MCI and Sprint generally could not participate. In addition, laws and regulations pre-dating the Telecom Act prohibited BOCs from providing cable television, video programming and other information services. Congress enacted the Telecom Act, with the purpose of breaking down these rigidly segmented services markets.

The Agreement is to develop infrastructure and does not involve telecommunications service as that phrase is defined in the Telecom Act and has been interpreted by the Commission.

standards which must be met before the Bell Operating Companies ("BOCs") will be permitted to offer long distance *services*. And Sections 651-653 relate to the ability of the BOCs to provide video programming *services*.

¹⁶ The term "incumbent local exchange carrier" is defined in Section 251(h), and such definition does not include the Developer.

As demonstrated above, Section 253(a) of the Telecom Act does not apply to the type of infrastructure development proposed.

B. The Project Will Foster Competition By Adding Fiber Optic Transport Capacity Without Prohibiting The Ability Of Entities to Offer Telecommunications Service.

Even if one assumes that the grant of exclusive right of access to Developer involves a requirement affecting the provision of telecommunications services, the State requirement does not violate the prohibitions in Section 253(a). Section 253(a) has two specific prohibitions. The first is that no state law or requirement shall prohibit an entity from offering telecommunications services. The second prohibition is that no state law or requirement shall have the effect of prohibiting an entity from offering telecommunications services.

1. There is no prohibition on providers' ability to offer telecommunications service.

The Agreement does not present the type of state law or requirement that has resulted in Commission findings of a prohibition on the offering of telecommunications services in violation of Section 253(a). For example, in *New England, supra*, the Commission pre-empted a state ruling that specifically prohibited independent payphone providers from offering payphone service to the public pursuant to Section 253. The Commission determined that, on its face, a Department of Public Utilities of Connecticut ("DPUC") decision precluded a certain class of telecommunications service providers from *offering* interstate and intrastate payphone services in Connecticut. *New England at para. 18*. Similarly, in *In the Matter of Classic Telephone, Inc. Petition for Pre-emption, Declaratory Ruling and Injunctive Relief*, Memorandum Opinion and Order, File No. CCB Pol 96-10, 11 FCC Rec. 13082 (1996) (Classic Telephone), the Commission pre-empted the decision of two municipalities to deny Classic Telephone's franchise applications. The Commission concluded that a municipal decision to prohibit an otherwise reliable entity from offering telecommunications service is precluded by Section 253(a).

Here, no state law, requirement or regulation exists that prohibits any entity from offering telecommunications services as a result of the exclusive grant to Developer of access to the freeway rights-of-way. Developer intends to deploy wholesale fiber optic transport capacity to carry voice, video and data traffic. This grant contains no prohibition on any firm's ability to offer any telecommunication services in Minnesota or any portion of Minnesota. No specific class of telecommunications service providers is prohibited from offering telecommunications service in Minnesota, nor is any specific entity being denied authority to offer such services. The challenged requirement merely indicates that other entities cannot directly access the freeway rights-of-way encompassed by the grant. Entities are free to operate and expand existing fiber capacity and to place new fiber in alternative locations in Minnesota. Entities may contract to install collocated fiber capacity concurrently with installation of Developer's network capacity and can also purchase or lease Developer's network capacity on a non-discriminatory basis under the terms of the Agreement. As such, there is no basis to assert that the state action prohibits an entity from offering telecommunications service.

2. The challenged State action does not have the "effect" of prohibiting providers' ability to offer telecommunications service.

The second prohibition in Section 253(a) is that no state law or requirement shall have the "effect" of prohibiting an entity from offering telecommunications services. The Commission has set forth the standard by which it will review state requirements under Section 253(a) in a series of orders issued in recent months. The Commission has stated that in determining whether the challenged law or requirement has the effect of prohibiting entry into the telecommunications market, the Commission will consider:

[W]hether the Ordinance materially inhibits or limits the ability of any competitor to compete in a fair and balanced legal and regulatory environment.

In the Matter of California Payphone Association Petition for Preemption of Ordinance No. 576 NS of the City of Huntington Park, California Pursuant to Section 253(d) of the Communications Act of 1934 Memorandum Opinion and Order, CCB Pol. 96-26, (rel. July 17, 1997), FCC 97-251

at para. 31 (*"Huntington Park"*). In that case the Commission did not preempt a municipal ordinance as having the effect of prohibiting any entity from providing payphone service even though various restrictions on the placement of payphones limited opportunities of payphone providers competing with the payphones of the Regional Bell Operating Company, Pacific Bell.

In reviewing whether a state requirement effectively prohibits an entity from offering telecommunications services, the Commission has examined whether the government action had the "practical effect" of prohibiting entities from providing intrastate or interstate service. *Id.* at para. 27.

In the following sections the Petitioners will describe the relevant market; the current competition in this market; ease of expansion; alternative rights-of-way and alternative access options to Developer's transport capacity. Before analyzing each of these components, it is important to note at the outset what this case is not about.

First, unlike *Huntington Park* and *In the Matter of TCI Cablevision of Oakland County, Inc.*, Petition for Declaratory Ruling, Preemption and Other Relief, pursuant to 47 U.S.C. §§ 541, 544(c) and 253, Memorandum Opinion and Order, CSR-47900, (rel. Sept. 19, 1997), FCC 97-331 (*"TCI Cablevision"*), this case is not about imposing new restrictions on previously utilized rights-of-way. Here, the freeway rights-of-way have not been utilized for longitudinal utility placements and the State action involved serves to add to, rather than detract from, the inventory of available rights-of-way in the State.

Second, this is not a case in which State contracting authority has been utilized with the purpose of conditioning or restricting competition. In fact, in this matter, the Agreement takes all feasible steps to require Developer to fulfill certain competition-enhancing provisions by providing for the installation, purchase or lease of transport capacity on a non-discriminatory basis. These provisions serve to make the Agreement functionally non-exclusive.

- a. **The relevant market for fiber transport capacity consists of ample alternative fiber providers, fiber capacity and rights-of-way.**

In *Huntington Park*, *supra*, the Commission began its analysis of the impact of a municipal ordinance restricting rights-of-way for payphone use by defining the relevant service and geographic markets. This definition assisted the Commission in analyzing the “practical effect” on whether the requirements had the effect of prohibiting entities from offering telecommunications services.

The relevant market affected by the Agreement is the wholesale fiber transport market throughout all of Minnesota. Unlike the payphone service market in *Huntington Park*, the market for fiber transport is already developed in Minnesota. As will be shown, an examination of existing competitors indicates that they have facilities and rights-of-way which serve 100 percent of current market demand. The State requirement places no new regulatory burdens on these providers and does nothing to restrict their ability to offer fiber transport in the same manner as they do today.

An examination of the relevant market also indicates sufficient excess capacity on current fiber networks as well as the ability of providers to economically expand their networks.

Finally, both existing competitors wishing to expand facilities and new entrants have access to sufficient alternative rights-of-way throughout Minnesota. The existence of alternative public rights-of-way, such as non-freeway State Trunk Highways and municipal rights-of-way, provide routes generally paralleling freeway rights-of-way. In addition, various private rights-of-way spanning the State exist and permit new entrants to construct fiber facilities in the State. Finally, the contract requirements to provide for non-discriminatory installation of collocated fiber capacity and the sale or lease of Developer’s network capacity create additional means to provide telecommunications services.

A detailed examination of each of these market opportunities follows:

i. Existing fiber providers and routes.

An examination of the existing providers in the market for fiber transport capacity demonstrates that no de facto prohibition results from implementation of the Agreement. The State currently purchases fiber backbone services from MCI, which uses its own facilities and those of MEANS to provide service to the State at locations that will be served by the Developer's network. In addition, AT&T operates a fiber network in Minnesota which is capable of transporting voice, video and data traffic. Exhibit 8, Affidavit of Bhimani. U S West, the RBOC serving Minnesota, although it cannot yet carry traffic across LATA boundaries, has deployed significant miles of transport capacity in Minnesota. Other LECs have also invested in deployment of fiber optic cable as individual corporate entities, and through their ownership of MEANS. MEANS claims to link Minnesota communities shown on Exhibit 9 with a "fully digital fiber optic network." MEANS Home Page, <http://www.means.com/fibernet.html>. Interexchange carriers, such as MCI, U.S. Link, Sprint and Wiltel, also have deployed fiber optic cable through various parts of Minnesota. Local transport providers such as MFS and MCImetro, have deployed fiber in the Metropolitan area. Exhibit 8, Affidavit of Bhimani.

As of 1994, there were an estimated 7,265 sheath kilometers of fiber, or 403,964 kilometers of fiber strands, in the State of Minnesota. *Statistics of Common Carriers, Federal Communications Commission, Table 2.2, 1994/1995 edition*, attached hereto as Exhibit 10. The State of Minnesota Department of Public Service ("MDPS") recently compiled a fiber map showing all of the various fiber in Minnesota. Exhibit 11. The names of specific carriers are not identified as they were claimed to be proprietary. However, the map indicates that the current placement of fiber optic cable in Minnesota is healthy and robust and nothing in the grant of exclusive access to the freeway rights-of-way has the effect of prohibiting these carriers from continuing to provide telecommunications services throughout the State of Minnesota over this existing fiber capacity.